**E-Discovery, Facebook Shenanigans, and Fraud:**

**The *Crowe v. Marquette Transportation* Case**

The Maritime Law Association of the United States

Continuing Legal Education Program

Young Lawyers Hot Topics

October 22, 2015

By Marissa M. Henderson[[1]](#footnote-1)

Social media is everywhere—Facebook, Twitter, LinkedIn, Instagram, Pinterest, Periscope,[[2]](#footnote-2) the list is seemingly ever-growing. The Millenial generation, especially, post, text and message on multiple platforms as their preferred means of communication. But social media’s impact goes beyond our personal lives. It impacts the practice and business of law and lawsuits. I’m here to talk a bit about how social media can impact legal cases, especially maritime personal injury actions. I’ll use one particularly interesting, and still pending, case in New Orleans as a case study.

A couple of things that I will touch upon and that will hopefully give you food for thought in your practice: (1) the nuts and bolts of how to use discovery to get at social media accounts, including overcoming common objections; (2) ethical ramifications, such as whether there is an ethical duty to advise clients of social media in litigation; and, last but not least, (3) fun and interesting real life examples of how social media and the internet have impacted claims and litigation.

1. **The *Crowe* Case: What Not to Do**

The *Crowe v. Marquette Transportation[[3]](#footnote-3)* case started out as your typical seaman’s case for personal injury under the Jones Act, with maintenance and cure and unseaworthiness claims also asserted. Brannon Crowe, a millennial-generation tug deckhand, claimed he injured his knee while moving a heavy pump off the vessel to the dock while standing on the vessel’s bull rail. He filed suit in May 2014 in the Eastern District of Louisiana.

Early in discovery, Marquette served a broad request for production on Crowe, seeking “an unredacted, unedited digital copy of your entire Facebook page” since he began work with Marquette. The request even included instructions on how to get it. Facebook provides instructions and a simple way to “download a copy of your Facebook data.” Crowe objected as overly broad, unduly burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence—the usual objections to social media discovery. Crowe’s answer also stated: “[P]laintiff does not presently have a Facebook account.” However, in deposition, Crowe stated he had recently “eliminated” his Facebook account. Marquette moved to compel, filing in support of its motion a phone’s screen shot of what appears to be a Facebook message exchange between another deckhand, Robert Falsev, and “CroWe” (capital w), in which Crowe states he “got hurt before [he] got on the boat,” and asks Falsev to say the captain told them to put nonskid on the bulwarks. Lack of nonskid was his unseaworthiness theory. Crowe argued Marquette was on a fishing expedition, and, alternatively, sought an *in camera* review of the Facebook account. Crowe also said his Facebook account had been “hacked,” and he did not have a capital “w” in his last name. Marquette also moved to compel a forensic exam of Crowe’s phone. The court ordered Crowe to provide his entire Facebook history to it for an *in camera* inspection, and, ultimately, it also ordered a forensic exam of Crowe’s phone.

The court received 4,000 pages of Crowe’s Facebook history. After conducting just a cursory *in camera* review, the court (Magistrate Judge Michael North) issued an Order to produce the entire 4,000 pages to Marquette, noting it was “patently clear from even a cursory review that this information should have been produced as part of Crowe’s original response.” The judge was not amused that Crowe’s Facebook account was deactivated 4 days after the written discovery request was served. The judge also noted the Facebook account was accessed regularly by an iPhone, and it was reactivated by that same iPhone a week before the account data was produced to the court. The judge was also “troubled” with Crowe’s discovery answer that he did not “presently have a Facebook account,” noting Crowe had only deactivated his account but had not deleted it. Then the court quoted from Facebook’s technical pages explaining deactivation versus deletion of an account. Deactivating it just means your profile is not visible, but all the content is retrievable and can be reactivated at any time.

Part of the reason the court ordered Crowe to produce his Facebook data was because Crowe had tried to hide it from opposing counsel. The court also allowed an intrusive forensic exam of Crowe’s iPhone, allowing an expert to conduct a “jailbreak” of the phone to look for deleted text messages. When Marquette reviewed the data, it found Facebook messages between Crowe and Falsev were non-existent before a certain date, including the smoking gun message, but plentiful after that date; Marquette argues Crowe must have deleted them. (Deleting messages on Facebook does actually make them irretrievable from your account. However, it is a unilateral deletion; recall that Falsev could still retrieve Crowe’s messages from *his* Facebook account.)

Marquette moved to file a counterclaim against Crowe for, among other things, fraud under the general maritime law and damages under state law not in conflict with maritime law. The district court allowed Marquette to make the counterclaim. Trial is set for Oct. 5th, 2015. At the time of writing, pending motions include admissibility of numerous text messages and Facebook messages and Crowe’s motion to exclude the counterclaim for failure to state a claim. Having reviewed the text messages attached to the pleadings, I note it feels incredibly intrusive to read them—Crowe texts about his hopes and dreams, business ventures he hopes to start in the Philippines, a friend’s drug and criminal problems, nothing is off limits. Crowe is, I think, a typical millennialwho communicates electronically about everything. Had he been having an affair or had other such things to hide, lawyers on both sides, and anyone with a PACER account willing to take the time to pull documents from PACER, would know.

***Lessons from the Crowe Case***

An important takeaway from the *Crowe* case is that we, as lawyers, need to have a basic understanding of how social media works, and we should consider routine education of clients that their social media accounts and texts may be subject to discovery. Early counseling with Crowe might have changed this case altogether—Crowe may have avoided electronic communications to (allegedly) ask a witness to lie and there would be no smoking gun text message. It would have come down to a standard credibility battle between plaintiff and a witness, with no Facebook message to lend credence to the witnesses’ story. Another takeaway from the *Crowe* case is to question your clients more rigorously before answering in written discovery that he or she has no Facebook account. Deactivated is not deleted for Facebook. Crowe thought he was clever by deactivating his account, because it meant no one searching for his account would find it. However, he did not delete it, and all 4,000 pages of his account were just lying in wait to be reactivated and retrieved. A final takeaway is that if your client does take down material on social media that may be relevant, you should advise him to retain a copy or retain it yourself. Had Crowe actually deleted his Facebook account, he probably would be facing sanctions for spoliation.

1. **NUTS AND BOLTS TO SOCIAL MEDIA DISCOVERY**

Courts around the country have found social media evidence to be discoverable. Below are common objections raised to social media discovery, and strategies to overcome such objections.

1. **How to Get it: Overcoming Common Objections**
2. Privacy. The argument that social media information is subject to privacy protections can generally be overcome, and there is precedent sprinkled across jurisdictions.[[4]](#footnote-4) Essentially, the response is that information shared through social networking sites such as Facebook or Twitter can be copied and disseminated by others, possibly strangers depending on the individual’s privacy settings, so any concept of privacy is meaningless. In fact, one New York state judge wrote, “If you post a tweet, just like you scream it out the window, there is no reasonable expectation of privacy.”[[5]](#footnote-5) In 2010, Facebook’s Mark Zuckerberg famously discussed a new “social norm” of sharing information online, and the headlines ran, “Privacy is dead on Facebook.”[[6]](#footnote-6) As early as 1999, Sun Microsystems’ CEO Scott McNealy famously said to reporters, “You have zero privacy anyway. Get over it.”[[7]](#footnote-7)

Facebook’s privacy settings, if utilized, do not generally provide much protection from disclosure in discovery. Facebook’s settings allow you to limit some data to your “friends,” but you still cannot control what your “friends” decide to share or post. Regardless of privacy settings, courts generally (though not universally) recognize that information posted in social media is not truly private.[[8]](#footnote-8)

Any privacy arguments will be balanced against the need for the discovery. Hence, counsel will require a factual predicate to obtain the discovery. For example, in a personal injury case where the plaintiff’s quality of life post-accident is at issue, his photographs posted on-line prior to this accident and afterwards are arguably relevant to the issue. In *Nucci v. Target Corp.*, 162 So. 3d 146, 152-53 (Fla. Dist. Ct. App. 2015), the Florida court ordered production of all photographs on plaintiff’s social networking sites from two years before the accident to the present. It stated:

In a personal injury case where the plaintiff is seeking intangible damages, the fact-finder is required to examine the quality of the plaintiff's life before and after the accident to determine the extent of the loss. From testimony alone, it is often difficult for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a “day in the life” slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully relevant to the damage issues in the lawsuit. The relevance of the photographs is enhanced, because the post-accident surveillance videos of Nucci suggest that her injury claims are suspect and that she may not be an accurate reporter of her pre-accident life or of the quality of her life since then. The production order is not overly broad under the circumstances, as it is limited to the two years prior to the incident up to the present; the photographs sought are easily accessed and exist in electronic form, so compliance with the order is not onerous.[[9]](#footnote-9)

1. Relevancy. As noted above, courts do require a threshold showing of relevancy to allow social media discovery, more so the broader the discovery request.[[10]](#footnote-10) In the *Crowe* case, counsel could show relevancy of requested phone and Facebook data because a witness had given them a “smoking gun” Facebook message and claimed to receive damaging texts from plaintiff. In other cases, personal injury claims alone provide some justification to get at social media content. For example, in a recent Florida case, *Tyer v. Southwest Airlines Co.*,[[11]](#footnote-11) the federal court ordered plaintiff to produce all post-injury photographs of herself posted on social media, because they were relevant to her physical condition, which she placed at issue by alleging personal injury damages.[[12]](#footnote-12)

Counsel may have to lay a foundation for social media discovery, however, by establishing the party’s use of social media, as noted below in the practitioner tip section. Ultimately, if the discovery request is adequately tailored to the relevance argument, a relevancy objection should be overruled.

1. Federal Stored Communications Act- a persistent, though failed objection.

The Stored Communications Act (“SCA”), 18 U.S.C. § 2701 -2712, was enacted to, among other things, protect privacy interests in personal information by preventing providers of communication services from divulging private communications. The SCA does not apply to private persons who use communications services.[[13]](#footnote-13) Therefore, though the SCA is still raised as an objection to social media discovery, it provides no barrier to obtaining social media data in discovery.

1. **Practice Tips for Social Media Discovery**[[14]](#footnote-14)
2. **Take a “Snapshot” of the Party’s Public Profile**

Counsel—at least defense counsel in a personal injury matter—should conduct a search of the internet for plaintiff’s social media presence early in case. Counsel should print or save the public information, which will help identify if the plaintiff later removes some content, such as photographs. Plaintiff’s counsel, too, should consider counseling their client on how social media may be discoverable and used in litigation, as discussed below, and should also find out what his client has out there in social media.

1. **Ask a Simple Interrogatory to Identify Accounts and User Name**

In early discovery, ask a single interrogatory for identification of plaintiff’ social media accounts—but just their existence and the username. Early discovery requests are not the time to start a discovery battle by seeking unlimited data or passwords; the goal is to learn early on which platforms plaintiff uses and what information he or she has openly available. The user name is important, since your own internet search may not locate accounts if a pseudonym is used. If any new accounts are identified, go back to step one and take a snapshot of publicly-available content on those social media accounts.

A sample interrogatory, unlikely to draw credible objection:

Identify your accounts on Facebook, Twitter, Instagram, and LinkedIn, and your username on each account.

1. **Ask Basic Social Media Questions in Deposition**

Consider adding to your basic defense deposition outline a series of questions to get basic information about whether and how the plaintiff uses social media. On the plaintiff’s side, prepare your client to answer such questions and to not appear defensive or hedge his answers. The goal should be to build your threshold of relevancy to do further social media discovery, or eliminate the issue altogether if he or she does not use social media (and you believe him or her!).

Questions to ask:

* Confirm accounts and user names identified in written discovery.
* How often and which platforms used; number of friends or followers.
* What type of information posted or shared: mostly kids pictures? Pictures of yourself, share your physical/emotional condition?
* Any discussion of the case on social media, the facts, the underlying accident, damages, or the dispute.
* Altered or deleted any content since the accident or dispute? Identify.

1. **Develop a Reason to Obtain Social Media Discovery**

Social media discovery follows the same basic rules of any other type of discovery—it must be relevant and, under the revised Federal Civil Rule 26(b)(1), *“proportional to the needs of the case*.” This proportionality requirement will be an addition to Rule 26 effective December 1, 2015, so it remains to be seen how or if this clause will change the scope of discovery. Regardless, counsel wishing to obtain social media information in discovery should expect to have to state some credible facts, made in good faith, that make it likely that relevant material will be found on the party’s social media accounts. Counsel’s early investigation efforts should gather such facts, if they exist. In the *Crowe* case, it appears a witness told defense counsel that plaintiff had told him he was hurt before the fishing voyage, and he had texted and Facebook messaged some relevant communications to the witness.

If you asked plaintiff the deposition questions above, you should be well positioned to build on both the relevance argument and on identifying targeted information for discovery requests. For example, if plaintiff claims she is unable to perform her normal housework activities, and she testified in deposition that she posts 3 or 4 times a day and often includes her activities, counsel has a reason to ask for her Facebook status posts from the underlying incident to the present. Arguably, counsel could request pre-incident Facebook status posts because it will reveal plaintiff’s pre-incident activities and allow comparison to post-accident.

1. **Make a Targeted Request for Production**

Identify the narrowest scope for an initial production request that should generate useful results. Start with a request that you have an articulable, case-specific reason for seeking. For example, if you learned in deposition that the plaintiff posted pictures of herself both before and after the accident (and her physical condition is at issue), you can articulate a reason to request photographs of plaintiff posted on social media for some limited time before the incident and after, and possibly only those photographs that depict the area of the body at issue in the lawsuit. Remember, the more tailored the request the more likely you will get it. Include a brief explanation of how to retrieve such data. However, by all means, if you have an articulable reason for a broad discovery request, make it. For example, in the *Crowe* case, defense counsel’s request for production stated:

An unredacted, unedited digital copy of your entire Facebook page from the onset of your employment with Marquette until the present. (This is a simple process specifically provide under the “General Settings” page on Facebook. Just click on “Download a copy of your Facebook data” and follow the instructions.[[15]](#footnote-15)

Defense counsel in *Crowe* already had at least one witness informing them that *Crowe* had texted and Facebook messages regarding how he was really hurt and what to say for the lawsuit, so as to justify this broad request. However, given the caselaw, and to avoid appearing unreasonable to the court, it would be prudent to conduct social media requests in more justifiable, targeted “bites.” At a minimum, the timeframe of requested data should be limited. Should the requested material reveal a reason to get at more social media data, then counsel can seek further data later in discovery.

1. **ETHICAL CONSIDERATIONS FOR PRACTICE AND OTHER TAKEAWAYS FROM THE *CROWE CASE***

The *Crowe* case gives us insight into how important social media can be to litigation and raises lots of ethical questions for our practice. Some of these are addressed below.

1. **Duty to Educate Yourself About Social Media: Is Social Media Knowledge a Duty of Lawyer Competence?**

Due to the growing use of social media in discovery, a working knowledge of social media and technology is ethically required for attorney competence in practice areas in which social media discovery may play a role. State bar associations are increasingly including discussion about social media knowledge and use in their ethical guidelines, and some bar associations have drafted specific guidelines to address social media. In 2013, the ABA Ethics 20/20 Commission added Comment 8 to its Model Rule 1.1: Competence:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[[16]](#footnote-16)

It is likely your state bar association has adopted this comment, since the ABA Model Rules of Professional Conduct serve as models for the ethics rules of most states.

Related to this question is whether there is a duty to investigate the social media presence of an opposing party. For defense counsel in a personal injury matter, I would argue the answer is yes. It is advisable to investigate what is publicly-available about the plaintiff on-line, and, as noted above, to take a “snapshot” of any social media account data to use as a baseline to any further social media discovery.

1. **Is there a Duty to Educate Your Clients about Social Media?**

Yes, depending on the case and the client. It may be prudent to educate your clients, whether plaintiffs or defendants, about social media use and potential pitfalls in litigation. Some lawyers who are particularly sensitive to these e-discovery issues put educational warning language in their initial correspondence to clients, so their clients are aware of how social media may impact their case. In particular, when taking on a plaintiff’s personal injury matter, the lawyer should warn their client that information they post to social media could wind up as evidence against them in a lawsuit.

The North Carolina State Bar recently responded to a question of a lawyer’s duty to advise clients about social media, stating:

If the client’s postings could be relevant and material to the client’s legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments.[[17]](#footnote-17)

1. **How do you Ethically Advise your Clients about Using Social Media?**

There are certainly ethical pitfalls. By simply telling your client that any communications they have had on any electronic and social media platform may end up as evidence at trial, you may end up with a client who engages in spoliation and possibly even fraud.

1. **Taking Down Posts**

Generally, advising your client to delete negative social media data will run afoul of ethical rules when there is a duty to preserve such information. However, if the lawyer preserves information “taken down” from a client’s social media or counsels his client to preserve the data, he may comply with his state’s ethical rules. The North Carolina State Bar Ethics Committee has spoken on this point:

If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media. The lawyer may take possession of printed or digital images of the client’s posting made for purposes of preservation.[[18]](#footnote-18)

Indeed, in 2013 a Virginia lawyer was suspended for 5 years and faced a trial court sanction of $722,000 for advising his client to remove damaging photographs from his Facebook account and denying in discovery that plaintiff even had a Facebook account, among other misconduct.[[19]](#footnote-19) Apparently the offending picture portrayed plaintiff holding a beer, wearing a “I Love Hot Moms” shirt, with two blond girls in the background.

1. **Adding New Social Media Posts**

The New York State Bar is on the cutting edge of addressing the thorny ethical issues surrounding social media. This past June their Commercial and Federal Litigation Section issued “Social Media Ethics Guidelines.”[[20]](#footnote-20) These Social Media Guidelines are well-drafted, and they address topics covered here and beyond, such as furnishing legal advice through social media. One guideline of the Social Media Ethics Guidelines is particularly instructive here:

**Guideline No. 5.B:** **Adding New Social Media Content**

A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not “direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim.” [Citations omitted.]

*Comment*: A lawyer may review what a client plans to publish on a social media website in advance of publication and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person’s perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct. A lawyer may advise a client to refrain from or limit social media postings during the course of a litigation or investigation.

This proposed New York ethical guideline provides a roadmap on how to proactively advise your clients with respect to social media usage in litigation. Had Mr. Crowe been so advised (which he may have been), and had he taken that advice, he may not have used Facebook to allegedly tell a fellow deckhand how he “really” got hurt and the lies he wanted the deckhand to tell.

1. **War Stories** (to be discussed live)
2. **CONCLUSION**

A final takeaway from this discussion: you should act as if and advise your clients as if nothing is truly ever irretrievable once it is posted in social media. It remains somewhere, waiting to be retrieved from your Facebook history, or found by the recipient on his phone or Facebook Messenger account. It even gets archived randomly in something called “The Wayback Machine,” which allows you to “time-travel” into the Internet’s history. As lawyers, we need to be conscious that people, especially millennials, share their lives extensively on social media and this information can almost always be retrieved; we need to understand the basic benefits and pitfalls of social media usage and advise our clients accordingly.

1. Marissa M Henderson is a partner in Ventker Warman Henderson, PLLC, in Norfolk, Virginia. [↑](#footnote-ref-1)
2. Periscope, owned by Twitter, Inc., is a “hot” new app designed to let you see the world through someone else’s eyes. Users can post *live* video feed either to the public or to an invited group, replayable for 24 hours if the user sets the replay. *See* I-Tunes App store*,* Periscope app, available at *https://itunes.apple.com/us/app/periscope/id972909677?mt=8.* [↑](#footnote-ref-2)
3. *Crowe v. Marquette Transp. Co. Gulf-Inland,LLC*, No. 2:14-cv-1130 (E.D. La.) (Englehardt, D.J.). [↑](#footnote-ref-3)
4. *See, e.g.,* *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Ca. 2012) (“Generally, [social media] content is neither privileged nor protected by any right of privacy.”) (citation omitted); *Giacchetto v. Patchogue-Medford Union Free School Dist*., 293 F.R.D. 112 n.1 (E.D.N.Y. 2013) (rejecting arguments that a party’s interest in privacy of their Facebook account requires a showing that the account actually contains information that would undermine the party’s claims before the account data is discoverable because the Federal Rules do not require a party to prove the existence of relevant material before requesting it). In the criminal, Fourth Amendment context, the Supreme Court has assumed, but not held as such, that a municipal employee had a reasonable expectation of privacy in his text messages on a city-provided pager. *City of Ontario, California v. Quon*, 560 U.S. 746, 759 (2010). [↑](#footnote-ref-4)
5. *People v. Harris,* 945 N.Y.S.2d 590, 595 (Crim. Ct. New York Co. 2012). [↑](#footnote-ref-5)
6. Facebook did somewhat of an about-face in late 2014 when it added new and various privacy settings, although, speaking as a casual user of Facebook, the privacy settings are confusing and require some digging to locate and activate. [↑](#footnote-ref-6)
7. Wikipedia, Scott McNealy Article, https://en.wikipedia.org/wiki/Scott\_McNealy (last visited Sept. 18, 2015). [↑](#footnote-ref-7)
8. *See cf.*, *U.S. v. Meregildo*, 883 F. Supp. 2d 523, 525-26 (S.D.N.Y. 2012) (finding, in Fourth Amendment context, where defendant used privacy settings that allowed only his “friends” on Facebook to see postings, he “had no justifiable expectation that his ‘friends' would keep his profile private”); *see also* *A.D. v. C.A.*, \_\_ N.Y.S.3d \_\_, 2015 WL 4946422, \* 3 (Aug. 13, 2015) (“A person’s use of privacy settings on social media, such as Facebook, restricting the general public’s access to private postings does not, in and of itself, shield the information from disclosure if portions of the material are material and relevant to the issues of the action.”). [↑](#footnote-ref-8)
9. *Nucci v. Target Corp.*, 162 So. 3d 146, 152 (Fla. Dist. Ct. App. 2015). [↑](#footnote-ref-9)
10. *See, e.g., Mailhoit v. Home Depot U.S.A., Inc*., 285 F.R.D. 566, 570 (C.D. Cal. 2012) (“[S]everal courts have found that even though certain [social media] content may be available for public view, the Federal Rules do not grant a requesting party ‘a generalized right to rummage at will through information that [the responding party] has limited from public view’ but instead require ‘a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.’”) (citation omitted); *Melissa “G” v. North Babylon Union Free School Dist.*, 6 N.S.S.3d 389, 391-92 (N.Y. Sup. Ct. 2015) (finding Facebook photographs showing plaintiff engaging in recreational activities are probative and relevant to her claim for loss of enjoyment of life and requiring to preserve all Facebook data and plaintiff’s counsel to review all Facebook account data and produce relevant material). [↑](#footnote-ref-10)
11. *Tyer v. Southwest Airlines Co. f/k/a Airtran Airways, Inc.,* No. 14-cv-62899, 2015 WL 4537250, \*2 (S.D. Fla. July 27, 2015). [↑](#footnote-ref-11)
12. *See also* *Farley v. Callais & Sons LLC*, No. 14-2550, 2015 WL 4730729, \*3-4 (E.D. La. Aug. 10, 2015) (denying unlimited Facebook discovery of plaintiff, and allowing certain relevant categories of Facebook discovery); *Giacchetto v. Patchogue-Medford Union Free School Dist*., 293 F.R.D. 112, 115-16 (E.D.N.Y. 2013) (denying full access to plaintiff’s social networking postings but ordering production of her social networking postings referencing her emotional distress claims from the underlying incident and also postings that “refer to an alternative potential stressor” because she has “opened the door to discovery” on our sources or her emotional distress); *cf. Newill v. Campbell Transp. Co., Inc.*, 96 Fed. R. Evid. Serv. 527 (W.D. Pa. 2015) (finding plaintiff’s Facebook posts reflecting his physical capabilities inconsistent with his claimed injuries to be relevant and admissible at trial, notwithstanding some embarrassment). [↑](#footnote-ref-12)
13. *Nucci*, 162 So.3d at 155. [↑](#footnote-ref-13)
14. Some of these tips were suggested in a useful article, Christopher B. Hopkins, *Ten Steps to Obtain Facebook Discovery in Florida*, Trial Advocate Quarterly (Spring 2015). [↑](#footnote-ref-14)
15. *Crowe,* Jan. 20, 2015 Order and Reasons (Document 32), at 2. [↑](#footnote-ref-15)
16. American Bar Association, Comment on Rule 1.1, available at http://www.americanbar.org/groups/professional\_responsibility/publications/model\_rules\_of\_professional\_conduct/rule\_1\_1\_competence/comment\_on\_rule\_1\_1.html. [↑](#footnote-ref-16)
17. North Carolina State Bar, 2014 Formal Ethics Opinion 5, Opinion #1, available at http://www.ncbar.com/ethics/ethics.asp?page=528. [↑](#footnote-ref-17)
18. North Carolina State Bar, 2014 Formal Ethics Opinion 5, Op. # 2. [↑](#footnote-ref-18)
19. In the Matter of Matthew B. Murray, Virginia State Bar Docket Nos. 11-070-088405 & 11-070-088422. The disciplinary disposition is available at <http://www.vsb.org/docs/Murray-092513.pdf>. [↑](#footnote-ref-19)
20. Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association are available at http://www.nysba.org/socialmediaguidelines/. [↑](#footnote-ref-20)